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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

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**NO. 160**

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UNITED STATES OF AMERICA, *Appellant,*

*vs.*

NATIONAL MALLEABLE & STEEL CASTINGS CO., *et al.*

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**On Appeal From The United States District Court For The Northern District of Ohio**

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## MOTION TO DISMISS OR AFFIRM BY ASSOCIATION OF AMERICAN RAILROADS

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The Association of American Railroads was one of the defendants in this civil anti-trust action, but is not a manufacturer of couplers or parts and is *not* one of the "defendant manufacturers" referred to in the questions presented on appeal.

Pursuant to Rule 16, paragraph 1, of the Revised Rules of this Court, the Association of American Railroads (hereinafter referred to as "AAR") moves that the appeal be dismissed as to it on the ground that the appeal is not within the jurisdiction of this Court because not taken in conformity to the rules of this Court. In the alternative, AAR moves that the judgment of the District Court dismissing the complaint against AAR be affirmed on the

ground that it is manifest that, as to AAR, the questions on which the decision depends are so unsubstantial as not to need further argument.

## I. THE APPEAL SHOULD BE DISMISSED AS TO AAR BECAUSE THE QUESTIONS PRESENTED FOR REVIEW ON THE APPEAL ARE CONFINED TO THE DEFENDANT MANUFACTURERS AND DO NOT INVOLVE AAR.

None of the questions presented on this appeal names or involves AAR. This is true with respect both to the original statement of the questions in the Notice of Appeal and to the slightly revised form in which those questions are set out in the Jurisdictional Statement. At the outset (page 3) of the Jurisdictional Statement, however, it is said that the appellees include AAR. That introductory statement, which may have been inadvertent, necessitates this motion.

AAR is an unincorporated association composed of the principal railroads of the United States, Canada and Mexico. Its situation with respect to the issues of this case, and particularly with respect to the questions presented for review on this appeal, is distinctly different from that of the five other defendants.

The five defendants other than AAR are manufacturers of standard couplers and parts. Appellant states on page 3 of the Jurisdictional Statement that those five defendants "are the sole manufacturers" thereof. Included among them are the owners of the standard coupler patents discussed in the Jurisdictional Statement (p. 14). In the Notice of Appeal and the Jurisdictional Statement those five defendants are referred to, as they have been throughout this proceeding, as the "defendant manufacturers."

In contrast, as the District Court found, "Neither AAR nor any predecessor of AAR has manufactured or sold couplers or coupler parts" (Finding 3) and "There is no evidence that AAR or any of its predecessors: (a) has ever owned or controlled any patents on couplers or coupler parts; * * *" (Finding 80).

The complaint charged the defendant manufacturers with several different offenses against Section 1 and 2 of the Sherman Act. It included AAR as a defendant only with respect to the charge that manufacturers other than the defendant manufacturers have been excluded from the manufacture of standard couplers.* Charges with respect to alleged fixing of prices and terms of sale, for example, which are discussed in the Jurisdictional Statement, were never made against AAR.

By the time the trial commenced in the District Court, after the appellant had taken extensive discovery depositions and reviewed the files of the AAR and the defendant manufacturers, the nature of appellant's single claim against AAR had drastically changed. The formal charge in the complaint was that AAR had conspired and agreed to exclude persons other than the defendant manufacturers from making and selling the standard couplers. In a pretrial memorandum, filed shortly before the opening of the trial, appellant stated, instead, that "By their [AAR's] *inaction* they have aided the standard coupler manufacturers in maintaining their monopoly" (p. 3) and conceded that AAR was "*Without any willful intent* to help the defendant

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*At numerous points in the complaint the comprehensive word "defendants" was included without qualification, but it developed that appellant's use of that word, rather than the term "defendant manufacturers", was inadvertent. After inquiry from AAR, appellant filed a "Clarification of Complaint in re Defendant Association of American Railroads" (R. 24-25) making this plain.

manufacturers continue their monopoly * * *" (p. 4).* In the opening statement to the District Court appellant said that an injunction against AAR was sought "because the Association of American Railroads themselves have not by their own action, by their own initiative, taken measures to see that they don't *unwittingly* aid in the violation of the anti-trust laws * * *" (Transcript 14-15). Appellant stated in the closing argument, not that AAR was doing or threatening to do something unlawful, but that "AAR has failed to do anything" to prevent the defendant manufacturers from allegedly excluding potential competitors of the defendant manufacturers from making and selling standard couplers (Transcript 2583).

The District Court, after rendering an extensive oral opinion which is set out in the appendix to the Jurisdictional Statement, and after making extensive findings of fact and conclusions of law, found that neither the defendant manufacturers nor AAR were violating or threatening to violate the Sherman Act and dismissed the action against all defendants.

Appellant's Notice of Appeal states four questions presented by the appeal. Not one of them involves AAR. The second and third questions concern the setting of prices by the defendant manufacturers and the fourth question concerns rejection of evidence of the defendant manufacturers' alleged participation in a foreign cartel. No such charges were ever made against AAR. The first question presented by appellant concerns the alleged power and purpose of the defendant manufacturers to exclude competitors and thereby to monopolize and continue to monopolize a part of interstate commerce. Like the second, third and fourth questions,

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* Emphasis by italics has been added here and throughout this motion, except as otherwise indicated.

it is expressly limited to "the defendant manufacturers." It reads as follows:

> "1. Whether the *defendant manufacturers,* having jointly designed and developed a standard coupler for railroad cars, having jointly withheld from others data as to the sizes, dimension, and tolerances requisite for manufacture of the standard coupler and its parts, and having erected other barriers to entry into the trade involved, possessed the power and purpose to exclude competitors, and thereby monopolized, and combined to monopolize, a part of interstate commerce in violation of Section 2 of the Sherman Act." (p. 4)

In the Jurisdictional Statement, the wording of this question is slightly changed, but again it is expressly limited to the defendant manufacturers. The Jurisdictional Statement presents this question as follows:

> "1. Whether, on the showing that *defendant manufacturers* had jointly designed and developed the standard coupler, had jointly withheld from others data as to the size, dimensions, and tolerances requisite for manufacture of the standard coupler and its parts, and had erected other barriers against entry into manufacture of such coupler and its parts, the district court erred in failing to find and to conclude that *defendant manufacturers* possessed the power and purpose to exclude competitors, and were monopolizing and conspiring to monopolize a part of interstate commerce in violation of Section 2 of the Sherman Act." (p. 3)

The fact that AAR is not involved in the questions presented on appeal is further emphasized in the Jurisdictional Statement as follows:

> "The basic question presented by the appeal, therefore, is whether the defendants abandoned their monopolization, conspiracy to monopolize, and conspiracy to eliminate price competition and to sell at uniform

prices when they formally abrogated the 1916 agreement.

"1. We submit that facts which stand admitted establish that the *defendant manufacturers* have, since 1945 as before, illegally monopolized trade and commerce in standard couplers and coupler parts." (p. 16)

* * * * *

"2. We submit that on the admitted facts the *defendant manufacturers* were engaged in an illegal price-fixing combination." (p. 18)

Here again it is apparent that the questions on appeal involve only the defendant manufacturers. While the broad word "defendants" is used in the statement of this "basic question," obviously the word refers only to the defendant manufacturers. This is plain both from the appellant's two answers to the "basic question" and also from the fact that the 1916 agreement to which appellant refers (and which it discusses at some length in the Jurisdictional Statement) was an agreement solely among the defendant manufacturers. "Neither AAR nor any of its predecessors was ever a party to the Standard Coupler Agreement of 1916, or to any other agreement supplementary or amendatory thereto" (Finding 24).

While the Notice of Appeal stated formally and generally that appellant was appealing from the judgment below, it presented no question that involved AAR or that comprised any question about AAR. Rule 10, paragraph 2, of the Revised Rules of Practice of this Court provides that "Only the questions set forth in the notice of appeal or fairly comprised therein will be considered by the court." The complete difference in circumstances between AAR and the defendant manufacturers thoroughly justified appellant in excluding AAR from the questions presented on appeal, but by the same token AAR should not be retained as an appellee. The appeal should be dismissed as to AAR.

## II. IF THE APPEAL IS NOT DISMISSED, THE DECISION BELOW AS TO AAR SHOULD BE AFFIRMED.

If all the questions presented for review by this Court were answered in the affirmative, as appellant requests, the result would be a finding that the *defendant manufacturers* "possessed the power and purpose to exclude competitors" and to eliminate price competition among themselves. But such a decision against the defendant manufacturers would afford no basis whatever for reversing the District Court's judgment dismissing the complaint against AAR. If the appeal is not dismissed as to AAR, clearly the judgment dismissing the complaint as to AAR should be affirmed on the ground that there is no substantial question that needs further argument.

A brief review of the facts and the questions raised about AAR in the District Court will further confirm the fact that there is no substantial question as to the decision below with respect to AAR.

One of the functions of AAR, through its Mechanical Division, is and has been the adoption of various standards (including alternate standards) for railroad car construction and for the numerous component parts of railroad cars, including couplers (Finding 5). Standard and alternate standard couplers are those couplers adopted as such from time to time by the member railroads of AAR or its predecessors (Finding 6). In this connection the Jurisdictional Statement speaks only of "the standard coupler" as if there is and has been only one such coupler (for example, at pp. 3, 4 and 6). The fact is that as new designs of couplers prove their merit, in the judgment of the railroad members of AAR as expressed by ballot of such railroads, they have been adopted as standard (Findings

8, 37). The original standard coupler, which was adopted as standard in 1916 and known as the "D" coupler, has been replaced by couplers later adopted as standard. For freight cars there are now three different designs of couplers which have been adopted as standard or alternate standard ("E", Swivel, and "F" couplers) and for passenger cars there are now two different designs, the "H" or Tight Lock coupler, and the Controlled Slack coupler (Finding 40). The railroads also adopt various modifications in a particular design of standard or alternate standard coupler from time to time as new improvements are developed (Findings 8, 40).

Such standards have been adopted on the basis of the judgment of the members of the AAR Committee on Couplers and Draft Gears and the judgment of the individual railroad members of AAR as to the mechanical merit, safety and cost of the articles (Finding 39). In adopting such standards, AAR and its predecessors have *not* done so for the purpose of limiting the manufacture thereof to the defendant manufacturers (Finding 39). Such standardization has greatly reduced the number of deaths and injuries from railroad operation and has further benefited the public through resulting economy to the railroads. "Plaintiff concedes, and the Court finds, that the standardization of couplers is necessary, desirable and beneficial" (Finding 20).

Despite the adoption of particular designs of couplers as AAR standards, each railroad retains the independent right to purchase and use any kind of coupler it may desire, regardless of whether it meets AAR standards, and that right has been exercised from time to time (Findings 9, 10). There is no agreement or understanding that the railroads will confine their purchases to such standard types (Finding 10).

It is frequently necessary for cars to be tendered from one carrier to another for interchange and haul over the line of the connecting carrier. Under an Interchange Agreement signed not only by the individual railroads, but also by the appellant and other non-railroad owners of freight and passenger cars, each road agrees that it will accept cars in interchange that are equipped with couplers (and other equipment) meeting AAR standards. While cars equipped with non-standard couplers may be refused in interchange, it is important to note that refusal is not required and in practice railroads have interchanged cars with non-standard couplers and other non-standard equipment, exercising their independent right (Finding 12).

In the Jurisdictional Statement appellant makes a statement in this connection which, unless carefully read and checked against the finding therein referred to, might create a wrong impression. It states, at page 6, that "the railroads' interchange rules, adopted pursuant to their Interchange Agreement, require connecting carriers to accept in interchange only cars equipped with the standard coupler (fng. 11)." Finding 11 actually states that "The Interchange Rules require connecting carriers to accept cars tendered in interchange if equipped as provided in the rules. Cars equipped with non-standard couplers may be refused in interchange, but refusal is *not* required," and Finding 12 is that "Many railroads, members of AAR and its predecessors, have interchanged cars with equipment of various kinds differing from the equipment specified in the Interchange Rules, including non-standard couplers and non-standard parts." For example, the Swivel Butt coupler and the Controlled Slack coupler were purchased and used on various railroads, including use in interchange, for some years while they were non-standard, and before they were adopted as alternate standard couplers (Def. Exs. 386-413; Transcript 842-843, 1330-1331, 1346-1347).

Appellant stated, in the District Court, that "AAR is a group of buyers who agree to boycott the purchase of couplers other than the standard type, other than the standard coupler for use in interchange, and the plaintiff contends that this boycott is justified to insure safety and to reduce the cost to the public" (Transcript 2583). Despite the fact that appellant stated that such a boycott would be justified, the evidence showed that there was in fact no such boycott, that each railroad is free to use or accept in interchange cars equipped with non-standard couplers and that many railroads have done so, from time to time. The Court, in the oral opinion, found that AAR "boycotted no one" (Appendix to Jurisdictional Statement, p. 64) and made the following written finding of fact: "Neither AAR nor any of its predecessors has boycotted or agreed with defendant manufacturers or with anyone to boycott the purchase or use of non-standard couplers or coupler parts * * *" (Finding 79).

Some of the features contained in the designs of the various couplers that from time to time have been adopted as AAR standards have been the subject of patents issued to the defendant manufacturers. On page 14 of the Jurisdictional Statement appellant refers to such patents and to the patent licenses issued thereunder, and states that "No license to manufacture a standard coupler has ever been issued to anyone other than a defendant manufacturer." Such licenses obviously could be granted only by the defendant manufacturers who owned the patents, and not by AAR. As the District Court found, "AAR would have no objection if persons or corporations other than the defendant manufacturers and other than their Canadian licensees were licensed to manufacture AAR standard couplers" (Finding 79), but clearly AAR could not grant such licenses.

Similarly, it is the defendant manufacturers and not AAR who have the exclusive control over the master gauges and the dimension drawings made and used by the manufacturers. Access to these gauges and drawings, as appellant states, "is within the exclusive control of the defendant manufacturers" (Jurisdictional Statement, p. 13). AAR does not own or control the gauges or construction drawings. There was no contention that the gauges were furnished to AAR, and AAR was not furnished with copies of all of the construction drawings (Transcript 770, 777-778, 2245). As the Court found:

> "One set of the construction drawings of standard couplers, marked 'Reproduction or distribution prohibited without authority of Chairman of Mechanical Committee' [of the defendant manufacturers] is usually furnished to AAR. Inquiries for copies of such drawings received by AAR were answered by referring the inquirer to the defendant manufacturers or their representatives. AAR had no right or authority to reproduce or distribute copies of such drawings." (Finding 36)

Here again, as in the case of the patent licenses, AAR could not give copies of the defendant manufacturers' drawings to other persons, but it could and did refer those persons to the defendant manufacturers or their representatives who did have control over the distribution of the drawings.

As noted above, one of the findings of fact is that "AAR and its predecessors, in adopting standards for couplers and coupler parts, have not done so for the purpose of limiting or confining the manufacture of such articles to the defendant manufacturers * * *" (Finding 39). At page 15 of the Jurisdictional Statement, appellant states that "For standard products other than couplers, AAR attempts to insure that an unpatented article is permitted as an 'alternate standard' whenever the 'standard' article is patented

(Tr. 2242-3)." These pages of the transcript show that what the witness actually testified was that "in general terms, the practice would be that we would like to have them where there are such non-patented articles in existence" (Transcript 2242-2243). With respect to couplers, there is no evidence and no contention by appellant that there are any designs of non-patented couplers in existence which afford the mechanical and safety advantages of the several designs of couplers that have been adopted as standard or alternate standard. Incidentally, the transcript does not contain the word "permitted" which appears in appellant's statement quoted above. Each railroad is free to exercise its own judgment as to purchasing and using a particular item of equipment. It needs no "permission" from AAR.—

At the same page 15 of the Jurisdictional Statement, appellant then says that in 1949 AAR rejected a proposal of a railroad member that AAR withhold approval of any more patented improvements to the standard coupler unless the patent holder agreed to license any applicant. That railroad's proposal was not limited to couplers; it involved directly the balloting as to adoption of standards for other articles of car construction (brake beams) as well as improvements in couplers (Plf. Exs. 378-1379, 382-1386) and the railroad stated that its proposal applied to the adoption of "*any* patented article"* as AAR standard (Plf. Ex. 11-1383). It stated that the proposed changes in the coupler standards were "desirable," but proposed that the owners of patents be "forced to agree to license the manufacture of these proposed couplers by other manufacturers than those now holding these rights" (Plf. Ex. 380-1384). Just how AAR could "force" the patent holders to take the action proposed was never made clear and the legal dangers if

* Emphasis in original.

AAR were to attempt to exert any such force or to try to supervise the granting of licenses by the holders of patents in the railroad supply business are obvious.

If AAR refused to adopt as standard or alternate standard the patented couplers which are admittedly the best and safest couplers available, the standards would be obsolete. Any defendant manufacturer who would refuse to succumb to such "force" from AAR would still be free to sell his improved non-standard article to the railroads and they would still be free to purchase and use it. Moreover, the practical difficulty or impossibility of AAR's being able to force the patent owners to license other manufacturers than the defendant manufacturers is underlined by the fact that "Since January 1, 1945 no one other than the defendant manufacturers, has evidenced any serious interest in obtaining the right to manufacture standard couplers, standard coupler parts or standard yokes" (Finding 76).

The lack of substance in appellant's charges against AAR in the District Court was apparent from appellant's suggestions to that court as to what kind of injunction it could enter against AAR (Transcript 2584-2585). Appellant suggested that AAR be ordered not to adopt any patented feature as a standard until the patentee agrees to license "on reasonable terms anybody who wants to come along and wants to manufacture that part or the entire coupler." If the patentee declined to agree to such supervision and control by AAR, then AAR would be under court order to boycott the patented article from the standards, even though it might be the best and safest article available. As mentioned above, however, the legal and practical difficulties of AAR's setting itself up in this way as the supervisor of the licensing under the patents of various defendant manufacturers are evident. The suggested injunction would also order AAR to make available to the public the master manu-

facturing gauges, which belong to the defendant manufacturers, and the manufacturing dimensions which are developed by the defendant manufacturers and set out in their construction drawings. Appellant itself states that access to these drawings and gauges is under the exclusive control of the defendant manufacturers, who designed and made them (Jurisdictional Statement, p. 13). Clearly, this is a matter involving only the defendant manufacturers, not AAR. Appellant also suggested in the court below that AAR could be ordered by the court to "handle inquiries from potential manufacturers themselves without referring them to the [defendant] manufacturers" (Transcript 2584). How this could be done, when the defendant manufacturers hold the patent rights, is impossible to see. Moreover, as to all the matters mentioned above, if any orders were to be entered requiring disclosure of the manufacturers' drawings or gauges or requiring licensing under their patents "on reasonable terms," the supervision of such disclosure and licensing should be by the Court and not by or through AAR. Finally, appellant suggested an order compelling AAR to enlarge its "engineering facilities" so that when the defendant manufacturers recommend an improvement in the standard couplers "and that improvement is patented," AAR, before adopting it as standard, would undertake to attain that same improvement without patents (Transcript 2584-2585). The record, however, shows that "Of the forty-nine modifications and improvements so incorporated in the past twenty-five years, only one was patented at the time of its adoption" (Finding 32). Moreover, the procedure suggested by appellant in this respect, of deliberately designing around a patent to obtain the same improvement, obviously would present serious risks of patent infringement, as well as threatening delay in the adoption of an improvement which may be known to make the couplers less likely to cause derailments or personal injuries.

The District Court concluded that AAR, which has no power to compel the granting of licenses under patents held by the defendant manufacturers and no power to compel those defendant manufacturers to disclose to the public the manufacturers' drawings and gauges, and no intent to aid the defendant manufacturers in any monopoly, is not violating or threatening to violate the Sherman Act. That conclusion is plainly correct and it is manifest that the judgment dismissing the complaint against AAR was proper. No question as to that part of the judgment has been raised on the appeal, a fact which of itself evidences the lack of any substantial question concerning that part of the judgment below. If the appeal is not dismissed as to AAR, the judgment in that respect should be affirmed.

Respectfully submitted,

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